Supreme Court of the United States.

No. 34.—October Term, 1905.

Valentin Trono, Maximo Angeles, and Timoteo Natividad, Plaintiffs in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[December 4, 1905.]

The plaintiffs in error were proceeded against in the court of first instance of the province of Bulacan, Philippine Islands, upon a complaint accusing them of causing the death of Benito Perez "with great cruelty and evident premeditation . . . by means of blows given with the butts of guns, they co-operating one with the other." In other words, the accused were complained of as guilty of murder in the first degree.

They were tried in the court above mentioned and were acquitted of the crime of murder and convicted of the crime of assault, which is included in the crime of murder charged in the complaint, and they were therefore sentenced by the court to suffer a penalty of six months' imprisonment and to pay a certain sum to the heirs of Perez, with subsidiary imprisonment in case of insolvency.

All three of the accused appealed to the Supreme Court of the Philippine Islands from the judgment and sentence of the trial court. The Supreme Court, having heard the case, reversed the judgment of the court of first instance and convicted the accused of the crime of homicide, (in substance, murder in the second degree,) which is included in and is a lower degree of the crime charged in the complaint, but is a higher degree of crime than that of which the accused were convicted in the court below. Two of them (Angeles and Trono) were sentenced to fourteen years, eight months and one day, and Natividad to imprisonment for eight years and one day, and all three to the payment of an indemnity to the heirs of the deceased.

The accused have brought the case here by writ of error to the Supreme Court of the Philippine Islands, for the purpose of reviewing the judgment of that court.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the Court.

The plaintiffs in error seek a reversal of the judgment in their case on the ground that the Supreme Court of the Philippine Islands had no power to reverse the judgment of the court of first instance, and then find

them guilty of a higher crime than that of which they had been convicted in that court, and of which higher crime that court had acquitted them, and they contend that such a conviction by the Supreme Court of the islands was a violation of the act of Congress, passed July 1, 1902, (32 Stat. 691,) a portion of the fifth section of that act providing that "no person for the same offense shall be twice put in jeopardy of punishment."

This language is to be found in connection with other language in the same act, providing for the rights of a person accused of crime in the Philippine Islands. The whole language is substantially taken from the Bill of Rights set forth in the amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the Thirteenth Amendment, and also prohibiting the passage of bills of attainder and *ex post facto* laws.

The important question to be determined is, whether this action of the Supreme Court of the islands did violate the act of Congress, by placing the accused twice in jeopardy.

The meaning of the phrase, as used in the above-mentioned act of Congress, was before this court in *Kepner* v. *United States*, decided in May, 1904, (195 U. S. 100,) where will be found a very full discussion of the subject. The plaintiff in error in that case had been acquitted of the crime charged against him in the court of first instance, but the Government, not being satisfied with the decision, appealed to the Supreme Court, and that court reversed the judgment of acquittal and found Kepner guilty of the crime of which the court of first instance had acquitted him, and sentenced him to a term of imprisonment, and suspended him from any public office or public trust, and deprived him of the right of suffrage. This court, upon writ of error, held that, in reversing upon the appeal of the Government, the judgment of the court of first instance, and itself convicting the accused and pronouncing judgment against him, the Supreme Court of the islands violated the provision in question, and its judgment was therefore reversed and the prisoner discharged. It was also held that the Government had no power to obtain a review of a judgment or decision of the trial court acquitting an accused party, and that the phrase in question was to be construed as the same phrase would be construed in the instrument from which it was originally taken, viz., the Constitution of the United States, and that the settled and well-known meaning of the language, as used in the Constitution, must also be taken when the same language is used in the act of Congress, and not as it might possibly be construed with reference to Spanish law or Spanish procedure.

The difference between that case and the one now before the court is obvious. Here the accused, while acquitted of the greater offense charged in the complaint, were convicted of a lesser offense included in the main

charge. They appealed from the judgment of the court of first instance and the Government had no voice in the matter of the appeal, it simply followed them to the court to which they appealed. We regard that fact as material and controlling. The difference is vital between an attempt by the Government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal, even though that judgment, while convicting him of the lower offense, acquits him of the higher one charged in the complaint.

We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

This question has given rise to much diversity of opinion in the various State courts. Many of them have held that the new trial must be confined to the lesser offense of which the accused had been convicted on the first trial, while other courts have held precisely the contrary, and that upon a new trial the whole case was open as if there had been no former trial. Most, if not all, of these two classes of cases have been cited by the respective counsel in this case and will be found in their briefs herein. It would be unprofitable to cite and refer to each of them in detail here. They have been carefully examined.

Those cases which limit the new trial proceed upon the ground, as stated in *People* v. *Dowling*, (84 N. Y. 478, 483,) by Folger, Chief Judge, as follows:

"The matter at the bottom is the constitutional provision that 'No person shall be subject to be twice put in jeopardy for the same offense,' (Const. of N. Y. art. 1, par. 6,) and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground that, by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new trial, though it brings him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one and keeps it as to the other. It

is upon this principle that where, by a verdict of guilty on one count or for one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

But in the subsequent case of *People* v. *Palmer*, (109 N. Y. 413, 419,) the effect of the statute of New York, known as sections 464 and 544 of the Code of Criminal Procedure, was under consideration. Those sections enacted as follows:

"SEC. 464. The granting of a new trial places the parties in the same position as if no trial had been had.

"SEC. 544. When a new trial is ordered it shall proceed in all respects as if no trial had been had."

The statute was held valid, and that it did not violate the constitutional provision against subjecting a person to be twice put in jeopardy for the same offense, as the jeopardy was incurred with the consent of and as a privilege granted to the defendant upon his application.

And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in *United States* v. *Harding et al.*, tried in the United States Circuit Court in 1846, (26 Fed. Cas. 131,) before Mr. Justice Grier, then a member of this court, and this is the ground substantially upon which the decisions of the other courts are placed.

In *Kring* v. *Missouri*, (107 U. S. 221,) it was stated by Mr. Justice Miller, who delivered the opinion of the court, that it was admitted that by the law of Missouri, as it stood at the time of the homicide, the prisoner having been convicted of murder in the second degree upon an indictment charging him with murder in the first degree, if that conviction was set aside he could not again be tried for murder in the first degree. That law

was in force at the date of the homicide for which Kring was sentenced to death, but it was subsequently, and before his retrial, changed so as to deprive him of the benefit to which he would otherwise have been entitled, and this court held that that change was, as to him, *ex post facto* and void. It was also said by the court that there was "no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed so that, as to that offense, it is *ex post facto*?" This court answered that question in the affirmative.

In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

It is urged, however, that he has no power to waive such a right, and the case of *Hopt* v. *Utah*, (110 U. S. 574,) is cited as authority for that view. We do not so regard it. This court held in that case that in the Territory of Utah the accused was bound, by provisions of the Utah statute, to be present at all times during the trial, and that it was not within the power of the accused or his counsel to dispense with such statutory requirement. But on an appeal from a judgment of this nature there must be a waiver to some extent on the part of the accused when he appeals from such judgment. When the first trial is entered upon he is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States* v. *Ball*, (163 U. S. 662, 671,) (and nobody now doubts it,) that if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted,

that he will be again tried for the offense of which he has been once convicted. This holding shows that there can be a waiver of the defense by reason of the action of the accused. As there is, therefore, a waiver in any event, and the question is as to its extent, (that is, how far the accused by his own action may be deemed to have waived his right,) it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of a lower offense. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment.

There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not cover, the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable.

A further question is made as to the power of the Supreme Court of the islands to reverse the judgment appealed from and itself convict the accused on appeal. The Supreme Court, in so doing, acted within its power and jurisdiction. It is a result of the ordinary procedure in the courts of that country, proceeding under the act of Congress already referred to. See statement of the procedure, in the case heretofore cited, (*Kepner* v. *United States*, 195 U. S. 100.)

The judgment of the Supreme Court of the Philippine Islands is right, and it is

Affirmed.

Mr. Justice HOLMES concurs in the result.

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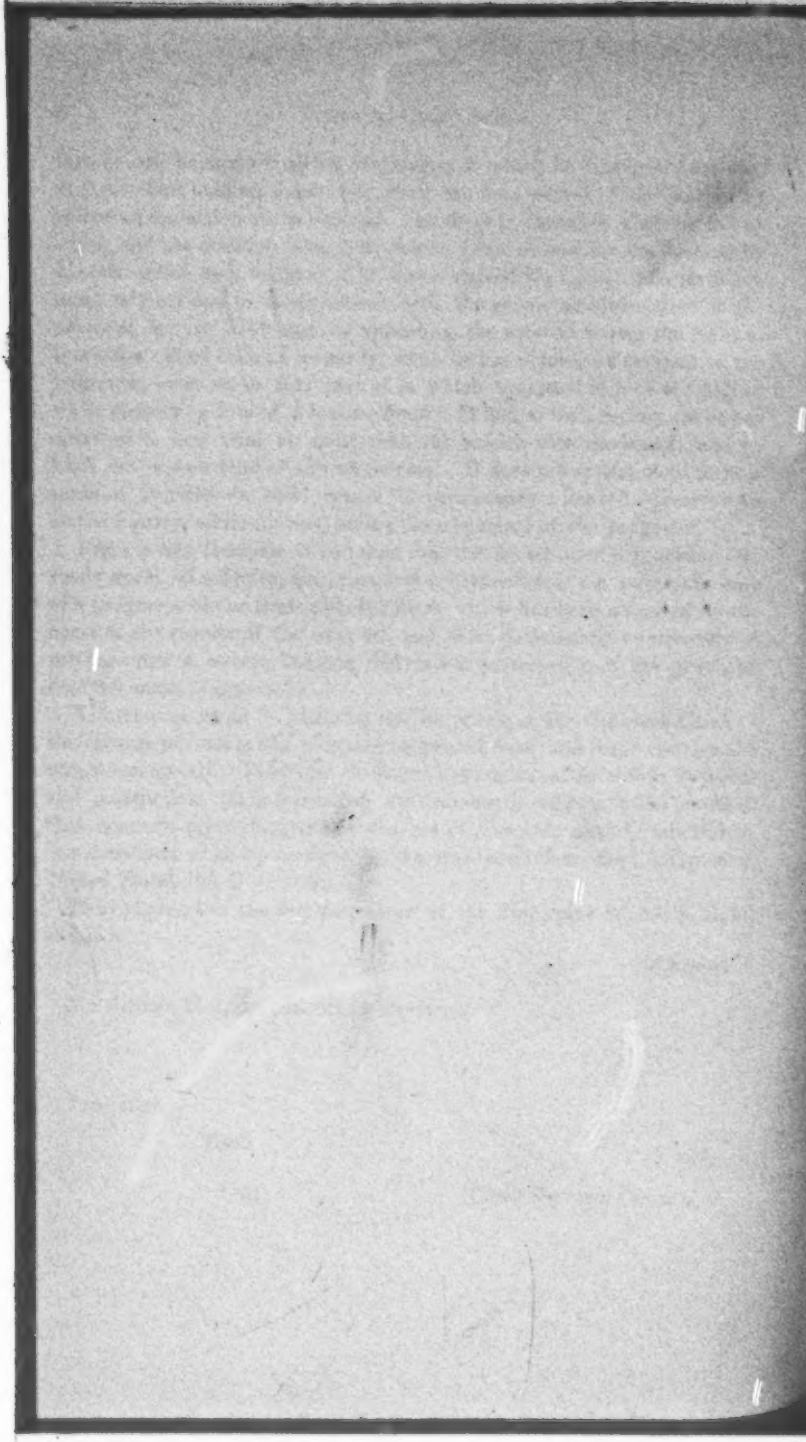

Supreme Court of the United States.

No. 84.—October Term, 1905.

Valentin Trono, Maximo Angeles, and Timoteo Natividad, Plaintiffs in Error,
vs.
The United States.

In error to the Supreme Court of the Philippine Islands.

[December 4th 1905.]

Mr. Justice Harlan, dissenting.

The plaintiffs in error were tried by one of the courts of first instance in the Philippine Islands for the crime of murder. The trial was before a single judge, without a jury, and simply upon a written complaint filed by an individual with a justice of the peace. The judge who tried the accused found them not guilty of murder, and guilty only of assault. For the latter offense they were each sentenced to six months' imprisonment. Upon appeal by the accused to the Supreme Court of the Islands, the judgment of the trial court was reversed, and two of the accused were condemned to the penalty, each one, of fourteen years, eight months and one day of *reclusión temporal*, the other one to the penalty of eight years and one day of *prisión mayor*, and all three to the indemnification of five hundred Philippine *pesos* to the heirs of the deceased.

I did not so state in a separate opinion in *Kepner* v. *United States*, 195 *U. S.* 101, but my concurrence in the judgment in that case was upon the ground that from the moment of the complete acquisition of the Philippine Islands by the United States, and without any act of Congress, or a proclamation of the President upon the subject, the people of those Islands became entitled, of right, to the benefit of all the fundamental guarantees of life, liberty and property to be found in that instrument. Hence, my approval of the view, announced in Kepner's case, that the accused was entitled to the benefit of the jeopardy clause of the Constitution.

Assuming that it was competent for the court of first instance to proceed without a jury against the accused upon a mere complaint by an individual, I desire to express my concurrence in the dissenting opinion of Mr. Justice McKenna, so far as it holds that the accused in the present case were entitled to the benefit of the jeopardy clause of the Constitution, and that after their acquittal in the tribunal assuming jurisdiction to try them for the crime of murder they could not thereafter, in

any appellate tribunal, deriving its authority from the United States, be again tried for that crime or for any crime more serious than the one of which they were convicted in the court of first instance.

But I dissent from the opinion and judgment of the court in the present case upon the broader ground that, as the Constitution of the United States is the supreme law of the land; as that instrument declares that except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, "*no person* shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and that "the trial of *all* crimes, except in cases of impeachment, *shall* be by jury;" and as the people of the Philippine Islands are as much under the authority and jurisdiction of the United States as are the people within the limits of the several States and of the organized Territories of the United States, the prosecution of the accused, based only upon the written complaint of an individual, filed with a Justice of the Peace, and their trial by a single judge, was without authority of law, and a nullity from beginning to end. I repeat substantially what has been said by me in former cases, that no person, within the territory and subject to the sovereign jurisdiction of the United States, can be legally deprived of his life or liberty for crime committed by him against the United States, except in the mode prescribed by the Constitution of the United States. I am unable to perceive how a principle declared by the supreme law of the land to be essential in all prosecutions for crime against the United States can be recognized as applicable to a part of the people subject to the sovereign jurisdiction of the United States, and yet be denied to another part of the people equally subject to the National authority. No tribunal or officer deriving its authority from the United States can disregard the mandatory injunctions of the Constitution by which the Government of the United States is created, and under the sanction of which alone that Government exists and performs its functions. It may be that the application of these principles to the Philippine Islands and to the people who inhabit them may, particularly in criminal prosecutions, prove sometimes to be inconvenient. But no authority exists anywhere to set aside plain provisions of the Supreme Law of the Land, and substitute the law of convenience for the written fundamental law.

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Supreme Court of the United States.

No. 34.—October Term, 1905.

Valentin Trono, Maximo Angeles, and Timoteo Nativadad, Plaintiffs in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[December 4, 1905.]

Mr. Justice McKenna, with whom concurs Mr. Justice White, dissenting.

I am unable to concur in the judgment of the court.

When the United States acquired the Philippine Islands the system of jurisprudence which prevailed there was different from our Anglo-Saxon jurisprudence. Trial by jury was unknown. The trial court, called the court of first instance, had full authority to find the facts and adjudge the law, subject, however, to a review by a higher court of both the facts and law.

This system was continued substantially by the orders of the President and the act of July 1, 1902, providing for the government of the islands.

Therefore when *Kepner* v. *United States*, (195 U. S. 100,) was decided I was of opinion that under such a system there could be no justifiable foundation for the plea of *autrefois acquit*, resulting from a judgment of acquittal by the lower court, when such judgment had been reversed by the higher court; in other words, that there could be no foundation for the plea of *autrefois acquit* arising from an acquittal in a case where the acquittal was subsequently reversed as a result of a right to review, not only the law but the facts, given by the very statutes which provided for the trial. The court, however, decided otherwise, and I joined in a dissent to the opinion. The Kepner case is not overruled. It is said to be so clearly distinguishable as not to call for much attention. I think otherwise. What was the Kepner case, and what is this?

Kepner was charged with the crime of embezzlement. He was tried in the court of first instance, without a jury, and acquitted. Upon the appeal of the United States to the Supreme Court of the Philippine Islands the judgment of the court of first instance was reversed, and he

was found guilty and sentenced to a term of imprisonment. This court reversed the judgment and discharged Kepner on the ground that by his trial in the court of first instance he had been in jeopardy, and to try him again upon the merits, even in an appellate court, was to put him a second time in jeopardy for the same offense. In the case at bar the plaintiffs in error were charged with murder. They were tried in the court of first instance without a jury. They were convicted of simple assault. They appealed to the Supreme Court, and that court reversed the judgment of the court of first instance and convicted them of murder in the second degree. I will not stop to demonstrate that the conviction of the lesser crime of assault was an acquital of the greater charge of murder. It has been made unnecessary by clear concession in the opinion that plaintiffs in error were acquitted of murder. Indeed (though it probably makes no difference in principle) it was explicit[illegible] found and pronounced in the judgment of the court of first instance. There is an exact parallel, therefore, between this case and the Kepner case in all particulars but one. In the Kepner case the appeal was by the United States; in the case at bar it was by the accused, and this difference is especially made the ground of decision. It is, in effect, held that because the defendants (plaintiffs in error) appealed and sought a review, as authorized by the statute, of the minor offense for which they were convicted, the United States was given the right to try them for the greater offense for which they were acquitted. In some of the cases quoted in the opinion such a result is said to arise from the consent of the accused, deemed to be given by taking an appeal. An accused would not purposely and consciously appeal from an acquittal of a grave crime and cast from himself the immunity that such an acquittal gives him. Should such consent be imputed? Let it be remembered that we are dealing with a great right, I may even say a constitutional right, for the opinion of the court discusses the case as though it were from a Circuit Court of the United States. Should such a right be narrowly or grudgingly considered? Should it be put in balance with other rights and lost by their exercise? I think that the guarantees of constitutions and laws should not be so construed. The life and liberty of the citizen are precious things—precious to the State as to the citizen, and concern for them is entirely consistent with a firm administration of criminal justice. I submit that the State seeks no convictions except in legal ways,

and because it does not it affords means of review of erroneous rulings and judgments, and freely affords such means. It does not clog them with conditions or forfeit by their exercise great and constitutional rights. Yet in my judgment such is the effect of the decision just rendered.

The opinion says that as the accused takes up the whole record for review, "he thereby waives the benefit of the provisions in question (once in jeopardy) for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher courts of the judgment of conviction." I repeat again, that constitutional guarantees and statutory remedies should not be put in such barter; that a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime.

In the opinion in the Kepner case it was said: "It is not necessary to determine in this case whether the jeopardy provision in the bill of rights would have become a part of the law of the islands without Congressional legislation." Resting the decision on that legislation, the court further observed: "How can it can be successfully maintained that this expression of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken? It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. (*The Abbotsford*, 98 U. S. 440.)"

If this language expresses a proper and determining test of once in jeopardy against the appeal of the United States, it must also be the test of once in jeopardy against the appeal of the accused in the case at bar. By that test the judgment should be reversed. Here and there may be found a decision which supports the exposition of once in jeopardy expressed in the opinion. Opposed to it is the general consensus of opinion of American text books on criminal law and the overwhelming weight of American decided cases. Which may we suppose Congress adopted in its legislation, the interpretation of a few cases (able, it may be, and highly sanctioned by the reputation of the courts that delivered them), or the inter-

protation of the courts of a large number of the States of the Union? See cases in the margin.*

The CHIEF JUSTICE also dissented.

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* Alabama—Bell v. State, 48 Ala. 684; Berry v. State, 65 Ib. 117; Sylvester v. State 72 Ib. 201.

California—People v. Gilmore, 4 Cal. 376; People v. Apgar, 35 Ib. 389; People v. Gordon, 90 Ib. 227.

Florida—Johnson v. State, 27 Fla. 245; Golding v. State, 31 Ib. 262.

Illinois—Brennan v. People, 15 Ill. 511; Barnett v. People, 54 Ib. 325.

Iowa—State v. Tweedy, 11 Iowa, 350; State v. Helm, 92 Ib. 540.

Louisiana—Dennison v. State, 31 La. An. 847; State v. Victor, 36 Ib. 978.

Michigan—People v. Knapp, 26 Mich. 112, 114; People v. Comstock, 55 Ib. 405, 407.

Minnesota—State v. Lessing, 16 Minn. 75.

Mississippi—Morris v. State, 8 S. & M. 762; Hurt v. State, 25 Miss. 376.

Missouri—Prior to alteration effected by constitutional amendment of 1875, (as to which see State v. Simms, 71 Mo. 538,) in State v. Ross, 29 Mo. 32; State v. Kattleman, 35 Ib. 105; State v. Brannon, 55 Ib. 63.

New York—Prior to alteration effected by the Code of Procedure, (as to which see People v. Palmer, 109 N. Y. 413,) in Guenther v. People, 24 N. Y. 100; People v. Dowling, 84 Ib. 478; and see People v. Cignarale, 110 Ib. 23, 30.

Oregon—State v. Steeves, 29 Or. 95.

Tennessee—Campbell v. State, 2 Yerg. 333; Slaughter v. State, 6 Humph. 410, 415.

Texas—Jones v. State, 13 Tex. 168.

Virginia—Before alteration by statute, (as to which see Briggs v. Com., 82 Va. 554, doctrine enforced in Stuart v. Com., 28 Gratt. 950. Reinstated by later statute, as to which see Forbes v. Com., 90 Va. 550, and Benton v. Com., 91 Ib. 782.

Washington—State v. Murphy, 13 Wash. 229.

Wisconsin—State v. Martin, 30 Wis. 216; State v. Hills, 30 Ib. 416; State v. Belden 33 Ib. 120. (But not in cases of misdemeanors—Rasmussen v. State, 63 Wis. 1.)

Georgia, owing to constitutional provisions, and by statute in the States of Indiana, Kansas and Kentucky, when a new trial is granted on motion of an accused he may be tried again for the greater offense of which he was acquitted on the first trial, (Morris v. State 1 Blackf. 37; Veatch v. State, 60 Ind. 291; State v. McCord, 8 Kan. 232; Com. v. Arnold, 83 Ky. 1.)

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Test:

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